HASAN SUI & ANOR.

v.

BAN LING SDN. BHD. & ORS.

HIGH COURT BORNEO
ABDUL KADIR SULAIMAN JC
[ORIGINATING SUMMONS NO. 26 OF 1991]
8 JULY 1991

LAND LAW: *Caveats - Registrar's authority to determine consent of caveators by implication - Right of caveators.*

The plaintiff's in O.S No. 31 of 1991 and No. 26 of 1991 are caveators claiming interest over certain sublots in a parcel of land situated at Tanjong Batu Road, Bintulu described as Lot 43 of Kemena Land District ("the said land").

The 1st defendant in both the summons were registered owners of the said land. The 2nd defendant became the transferee of the said land pursuant to the sale by order of Court under s. 148 of the Land Code (Cap. 81) ("the Code"). The 3rd defendant is the Superintendent of Land & Surveys, Bintulu, Sarawak.

At the request of all parties to the two summons they were heard together.

Before the order of sale, the said land was charged by the 1st defendant to Hock Hua Bank Bhd. ("the chargee"), as evidenced by memorandum of charge registered at Miri Land Registry Office on 27 June 1983 and memorandum of increase of amount owing under charge registered at the same Registry office on 12 August 1983.

Subsequently, the said land was encumbered by 11 caveats, 9 of which were lodged by the plaintiffs.

On 22 January 1990, on the application of the chargee Hock Hua Bank Bhd., the High Court ordered the sale of the said land by public auction to satisfy the sum due pursuant to the two charges.

The proceedings were between the two parties that is the chargee and the 1st defendant in these summons, without any notice to the caveators.

No mention was made of the caveats in the notice of sale which appeared in the Sarawak Government Gazette on 5 April 1990 nor in the order of Court dated 23 February 1990. The successful bidder was UTD Sendirian Berhad who nominated the 2nd defendant to be the transferee.

On 19 July 1990, by O.S the chargee applied to Court for orders to pay out the proceeds from the sale, for the execution of a memorandum of transfer by SAR, High Court, Sibu on behalf of the landowner, for the discharge of the charge, for the removal of all the caveats and for the release of the document of title to the said land to the chargee for the purpose of effecting registration of the memorandum of transfer in favour of the 2nd defendant.

It was at this point that the plaintiffs filed their affidavits in opposition objecting to the chargee's application to the removal of their caveats.

On 20 August 1990, the learned Judge made the order in the terms of the application except as to the payment out of the balance sum of RM1,443,525.85. As to the application to remove the caveats, the matter was adjourned to 12 March 1991 for arguments.

Pursuant to the Court order of 20 August 1990, the SAR on behalf of the 1st defendant, on 17 January 1991 executed a memorandum of transfer transfering the said land to the 2nd defendant which was registered at the Bintulu Land Registry office on 31 January 1991.

The Registrar purporting to act under s. 150(4) of the Code made an entry in the Register determining the caveats of the plaintiffs and that of Tan Ching Hoe and the 1st defendant.

By these two summons by the plaintiffs caveators, the plaintiffs apply to this Court for a declaration that the caveats were wrongly and illegally removed by the Registrar and for an order that the said caveats be reinstated *ab initio*, the Registrar be ordered to rectify the Register, damages, costs and such other orders as the Court may deem fit and expedient to make.

The issue before the Court is the fact that the Registrar made an entry in the Register determining the caveats without the order of the Court for their removal in the face of the prohibition by s. 175 of the Code. And the effect of the transfer of the said land to the 2nd defendant.

Held:

[1] The Registrar when dealing with s. 150(4) has no authority to determine the caveat, upon the registration of any memorandum of transfer regardless of whether the caveat is later in time over the charge or that no consent of the chargee is binding on him, if at the time of the registration the caveat remains in force.

[2] Unless it falls within the proviso to s. 175, the Registrar is statutorily obliged to refuse the registration provided steps are taken under s. 178 of the Code by allowing the caveat to lapse.

[3] Since the rights of the caveators has been wrongly determined by the Registrar, the learned Judge ordered that the Registrar rectifies the situation by restoring the Register document of title and other instrument applicable to the caveats of the plaintiffs to take effect retrospectively to the dates they were originally entered upon the Register.

[4] Thus the 2nd defendant takes the said land subject to the rights of the plaintiff's caveators.

[5] No order as to damages as there is no evidence as to actual loss suffered by plaintiffs.

[Order accordingly.]

Cases referred to:

John Edgar Jones v. P.L.S.K.R. Palaniappa Chetty [1935] MLJ 175 ***(dist)***
Woon Kim Poh v. Sa'amah bt. Hj. Kasim [1987] 1 MLJ 400 ***(dist)***
Malayan United Finance Bhd. v. Tan Lay Soon [1991] 1 CLJ (Rep) 292 ***(dist)***

Legislation referred to:

Land Code (Cap 81) (Sarawak), ss. 148, (1), (2), 150(4), 174, 175, 177, 178, 180
National Land Code, ss. 322(2), 327

For the plaintiffs - Linton Albert; M/s. Linton & Co.
For the 1st defendant - Ting Sing Chuan; M/s. Yong & Wong
For the 2nd defendant - William Lau; M/s. Lau & Co.
For the 3rd defendant - Lim Ho Peng, John Bong Kok Teck, Kenneth Ong Soo Kan

JUDGMENT

Abdul Kadir Sulaiman JC:

The plaintiffs in Originating Summons No. 31 of 1991 and No. 26 of 1991 are caveators claiming interests over certain sublots in a parcel of land situate at Tanjong Batu Road, Bintulu containing an area of 4.771 hectares more or less and described as Lot 43 Kemena Land District ("the said land"). The 1st defendant in both the summons were the registered owners of the said land, the 2nd defendant became the transferee of the said land pursuant to the sale by order of Court under s. 148 of the Land Code (Cap. 81) ("the Code"), and the 3rd defendant is the Superintendent of Lands & Surveys, Bintulu, Sarawak. At the request of all parties to the two summons they were heard together.

Before the order of sale, the said land was charged by the 1st defendant to Hock Hua Bank Bhd. ("the chargee"), as evidenced by memorandum of charge registered at Miri Land Registry Office on 27 June 1983 as Instrument No. L3015/1983 and memorandum of increase of amount owing under charge registered at the same Registry Office on 12 August 1983 as Instrument No. L3782/1983. Subsequently, the said land was encumbered with the following caveats lodged by:

(a) 1st plaintiff in O.S 31/1991 *vide* Instrument No. L2186/1987 on 6 November 1987,

(b) 2nd plaintiff in O.S. 31/1991 *vide* Instrument No. L466/1988 and L467/1988 both on 9 March 1988,

(c) 2nd plaintiff in O.S. 26/1991 *vide* Instrument No. L1163/1988 on 4 July 1988,

(d) 3rd plaintiff in O.S. 31/1991 *vide* Instrument No. L1210/1988 on 12 July 1988,

(e) Tan Ching Hoe, who is not a party to these two motions, *vide* Instrument No. L1409/1988 on 6 August 1988,

(f) 4th plaintiff in O.S. 31/1991 *vide* Instrument No. L984/1988 on 10 November 1988,

(g) 5th plaintiff in O.S. 31/1991 *vide* Instrument No. L2004 on 11 November 1988,

(h) 1st defendant in these summons *vide* Instrument No. L227/1989 on 13 February 1989,

(i) 6th plaintiff in O.S. 31/1991 *vide* Instrument No. L1791/1989 on 4 October 1989, and

(j) 1st plaintiff in O.S. 26/1991 *vide* Instrument No. L272/1990 on 3 February 1990.

On 22 January 1990, on the application of the chargee Hock Hua Bank Bhd., the High Court ordered the sale of the said land by public auction to satisfy the sum due pursuant to the two charges. The proceedings were between the two parties, that is, the chargee and the 1st defendant in these summons, without any notice to the caveators. On 20 April 1990, the said land was sold by public auction. The notice of sale appeared in the Sarawak Government Gazette on 5 April 1990 pursuant to an order of Court dated 23 February 1990. One of the conditions stipulates that the said land "be sold free of the registered encumbrances, namely, the memorandum of charge and memorandum of increase amount owing under charge both registered at the Miri Land Registry Office as Instruments No. L3015/1983 and No. L3782/1983 respectively." No mention was made of the caveats in the said *Gazette* or in the order of the Court. The successful bidder at the auction sale was YTD Sendirian Bhd., who nominated the 2nd defendant to be the transferee.

Despite the notice in the *Gazette*, up to this point the plaintiffs caveators did nothing. By originating summons dated 19 July 1990 the chargee applied to Court for orders to pay out the proceeds from the sale, for the execution of a memorandum of transfer of the said land by the Senior Assistant Registrar, High Court, Sibu on behalf of the landowner, the 1st defendant in favour of the 2nd defendant, for the discharge of the charge over the said land by the chargee, for the removal of all the caveats over the land forthwith and for the release of the document of title to the said land to the chargee for the purpose of effecting registration of the memorandum of transfer in favour of the 2nd defendant and the delivery to the 2nd defendant of the document of title to the said land after the registration of the memorandum of transfer. It was at this point that the plaintiffs filed their affidavits in opposition objecting to the chargee's application to the removal of their caveats.

On 17 August 1990 the said summons were heard before Datuk Chong Siew Fai J and all the plaintiffs were joined as defendants together with the landowner, the 1st defendant. On 20 August 1990 the learned Judge made the order in the terms of the application except as to the payment out of the balance sum of RMl,443,525.85 and as to that part of the application seeking the removal of the caveats. As to the application to remove the caveats, the matter was adjourned to 12 March 1991 for arguments. As far as the order of the Court dated 20 August 1990 the matter on the caveats was silent.

Pursuant to the Court order of 20 August 1990, the Senior Assistant Registrar on behalf of the 1st defendant, on 17 January 1991 executed a memorandum of transfer transferring the said land to the 2nd defendant. The said memorandum of transfer was registered at the Bintulu Land Registry Office on 31 January 1991. The Registrar purporting to act under s. 150(4) of the Code, upon the registration of the said memorandum of transfer, made an entry in the Register determining the caveats of the plaintiffs and that of Tan Ching Hoe and the 1st defendant.

Now by these two summons by the plaintiffs caveators, the plaintiffs apply to this Court for a declaration that the caveats were wrongly and illegally removed by the Registrar and for an order that the said caveats be reinstated *ab initio*, the Registrar be ordered to rectify the Register, damages, costs and such further or other orders as this Court may deem fit and expedient to make. The application is supported by the affidavit of Linton Albert affirmed on 26 March 1991 for the two plaintiffs in O.S. 26/1991 and the affidavit of Lin Kuan Yuh affirmed on 25 March 1991 for the six plaintiffs in O.S. 31/1991. In O.S. 26/1991 there are two affidavits in opposition affirmed by Edmund Erong Jugah on 24 April 1991 for the 1st defendant and by Barry Yek Siew Hui affirmed on 12 April 1991 for the 2nd defendant. In O.S. 31/1991 there is only one affidavit in opposition affirmed by Edmund Erong Jugah on 24 April 1991 for the 1st defendant. The two affidavits in opposition for the 1st defendant deal mainly on the demerits of the caveats instead of the validity or otherwise of the action by the Registrar determining the caveats on account of the transfer of the said land to the 2nd defendant, the transferee. In my view this is irrelevant for the purpose of these summons.

This is not an application for the removal of caveats under s. 177 of the Code. As regards the affidavit in opposition by the 2nd defendant, similarly, it did not depose as to the validity of the act of the Registrar in determining the caveats apart from saying that it is unfair that the transfer of the said land having been duly completed and having been transferred to the 2nd defendant free from all encumbrances that the caveats be reinstated. The 2nd defendant contends that he is a *bona fide* purchaser of the said land. While agreeing that he is a *bona fide* purchaser but it is only to the extent of what is contained in the notice of sales published in the *Gazette* in that it be sold free of the registered encumbrances, namely the memorandum

of charge and memorandum of increase amount owing under charge both registered at the Miri Land Registry Office as Instruments No. L3015/1983 and No. L3782/1983 respectively. He is put to notice of the existence of the caveats on the land before the land was purchased at the auction sale. Therefore, he cannot claim to be purchasing the said land free from all the encumbrances.

It is not in dispute that the said land was sold pursuant to an order of Court under s. 148 of the Code and a memorandum of transfer was executed and the said land was duly transferred to the transferee, the 2nd defendant who is the nominee of the successful bidder. It is also not in dispute that the said land at the time of sale was encumbered not only by the charges of the chargee but also by the 11 caveats, 9 of which were lodged by the plaintiffs and that the caveats were later in time than the charges. There was no consent of the chargee being obtained by the caveators so as to bind the chargee. Also not in dispute that there was no written consent of the caveators obtained before registering the transfer of the said land to the transferee while the caveats remain in force and pending the decision of the Court as to their positions in the Register.

What is in dispute is that, upon the registration of the said memorandum of transfer, the Registrar made an entry in the Register determining the caveats without the order of the Court for their removal in the face of the prohibition by s. 175 of the Code. For the Registrar, he was permitted to do so by s. 150(4) of the Code as the caveats have no priority over the charges and they do not bind the chargee as generally the effect of the subsection is that the transferee takes the land freed and discharged not only from the liability under the charges but also from any other estate or interest. Counsel for the 1st and 2nd defendants are of the view that as this transaction involves the sale by order of the Court as opposed to an ordinary conveyance, s. 175 should be read subject to s. 150 of the Code. In other words, s. 175 applies only in cases of ordinary conveyance. *John Edgar Jones v. P.L.S.K.R. Palaniappa Chetty* [1935] MLJ 175, *Woon Kim Poh v. Sa'amah bt. Hj. Kasim* [1987] 1 MLJ 400 and *Malayan United Finance Bhd. v. Tay Lay Soon* [1991] 1 CLJ (Rep) 292 were cited in support of the arguments. Unfortunately, however, the 3 cases cited are not in point. *John Edgar Jones'* case does not involve caveats. It was dealing with the position of a purchaser who buys the land at the price below the original reserved price, and therefore not sufficient to satisfy the claim of the chargee. It was held in that case that when land is sold at the instance of a chargee it vests in the purchaser free from the charge in respect of which the land was sold and all subsequent charges, and it makes no difference whether the purchaser is the chargee himself or a stranger. It is to be appreciated that the charge cannot be equated with a caveat. In a charge, consequent upon any default made in the payment of the principal sum, interest or other moneys secured by it, the chargee after taking the step provided in s. 148(1) may apply to the High Court under subsection (2):

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land,

whereas a caveat merely serves as a warning or notice by having it registered in the register document of title of the claim of the caveator, *inter alia*, to be entitled to or to be beneficially interested in any land, estate or interest by virtue of any unregistered agreement or other instrument or transmission. Its registration does not create any interest in land. It merely protects the caveator's existing interest, if any, which has not been registered. By the warning

or notice, the caveat restrains the caveatee, the proprietor of the land concerned from dealing with the land pending the determination by Court of the caveator's claim to title to the land, in an ordinary action brought by him against the proprietor for that purpose. The caveat serves as an interim protection of rights to title to land or registrable interest in land which he alleges but which is not yet proven. There is no hearing conducted by the Registrar, before lodgment and registration. The Registrar merely exercises his administrative power to register once an appropriate form is used and particulars are stated therein as required by s. 174 of the Code. After all it is only to be a notice or warning to any person intending to deal with the landowner of the caveator's claim which is yet to be determined by the Court. If, in the meanwhile, no heed is taken of the notice or warning the intended purchaser runs the risk of having acquired something which belongs to the caveator should he succeed in the action to be brought by him against the landowner before the Court later. Therefore, the intended purchaser buys the land subject to the caveat. For that reason, s. 175 prohibits dealings with land with caveat remaining in force except under circumstances provided therein. Section 175 reads as follows:

> 175. So long as a caveat remains in force, the Registrar shall not make any entry on the Register having the effect of charging, transferring or otherwise affecting the estate or interest in respect of which the caveat may have been lodged:
>
> > Provided that nothing herein shall prevent the completion of the registration of a dealing which has been accepted for registration before the receipt of the caveat or the registration of a dealing expressed to be subject to the rights of the caveator and to the registration of which the caveator has given his written consent.

For the above reason *John Edgar Jones'* case is of no assistance to the defendants. As regards *Woon Kim Poh's* case, while the respondents' caveat was still in force the company transferred the land to the appellant and the transfer was registered purportedly under an order of the High Court. The question was whether the Registrar was correct in law in registering the transfer whilst the caveat was still in force. In fact, the Court order was a direction to the Registrar for the removal of the three caveats (not including the caveat lodged by the respondent) and not a direction to register the transfer. The Supreme Court held that in the light of the prohibition against registration, endorsement or entry on the register document of title of any instrument of dealing so long as a caveat is in force provided in s. 322(2) of the National Land Code (which is in *pari materia* with s. 175 of the Code) the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an express provision of the National Land Code. In that case, the respondent applied for the registration of the transfer to be cancelled or to be declared null and void. However, the application now before me is not of such kind. The plaintiffs do not object to the transfer of the land to the 2nd defendant as evidenced by non-objection to the order of the Court dated 20 August 1990 after being told that the matter of removal of the caveats would be dealt with only on 12 March 1991. Having in mind s. 175 of the Code, it is reasonable for them to expect that the provisions would be complied with and their position as caveators would not be affected pending the disposal of the matter on 12 March 1991. However, to their surprise, the transfer and registration were done before 12 March 1991 and their caveats have been determined by the Registrar.

The case of *Malayan United Finance Bhd.,* involves an application for the removal of caveats under s. 327 of the National Land Code which is s. 177 of the Code, and the question of the competing right to discharge the charge as between the chargor and the caveator. It was held that as between the chargor and the caveator, the question of the competing right to discharge the charge on the part of the caveator does not arise at all because the National

Land Code does not avail the caveator the right to discharge or redeem the charge. To that extent, this case is of no assistance to the defendants in opposition to this application by the plaintiffs.

As to the argument that s. 175 applies only to ordinary conveyancing and not to cases involving the transfer pursuant to a Court order arising out of a judicial sale, there is no merit in the argument. If it is the intention of the legislature to be so, it would have made an express provision to that effect. In my view s. 175 applies to all dealings envisaged by the section regardless of whether it arises out of a Court order or otherwise. In this respect s. 150(4) must be read to be subject to s. 175 of the Code instead of the other way round. Section 150(4) reads as follows:

> 150(4). Upon the registration of any memorandum of transfer executed in accordance with this section, the estate or interest of the chargor therein expressed to be transferred shall vest in the transferee, freed and discharged from the liability under the charge under which the power of sale has been exercised and from any other estate or interest, except an estate or interest which has priority over the charge or which by reason of the consent of the chargee is binding on him, and the Registrar may make in the Register any entry necessary to show that every such liability, estate or interest has been so determined.

Having said so and having ruled that a caveat is not an estate or interest in land, I am of the view that the Registrar when dealing with s. 150(4) has no authority to determine the caveat, upon the registration of any memorandum of transfer regardless of whether the caveat is later in time over the charge or that no consent of the chargee is binding on him, if at the time of the registration the caveat remains in force. Unless it falls within the proviso to s. 175, the Registrar is statutorily obliged to refuse the registration provided steps are taken under s. 178 of the Code by allowing the caveat to lapse. Section 178 reads as follows:

> 178. Except in the case of a caveat lodged by the Registrar in exercise of powers conferred upon him by this Code, every caveat shall, upon the expiration of three months after notice given to the caveator that application has been made for the registration of any instrument affecting the land, estate or interest, be deemed to have lapsed as to that land, estate or interest, or so much thereof as is referred to in the notice, unless notice is within the said period of three months given to the Registrar that application for an order to the contrary has been made to the High Court and unless such an order, is made and served on the Registrar within a further period of twenty-one days, or such extended period, if any, as the High Court, by order made prior to the expiration of the further period mentioned, may in any special circumstances allow.

It was also contended by the learned Counsel for the defendants that in order to succeed the plaintiffs must satisfy the Court as to the ground for the existence of the said caveats in the Register in the first place. I would say that there is no merit to the contention as the said caveats were in the Register pursuant to s. 174 of the Code. Unless removed pursuant to s. 177, or lapsed by s. 178 or withdrawn pursuant to s. 180, the caveat remains in force pursuant to s. 175 of the Code. The argument would have merit only in an application for its removal under s. 177 of the Code.

In the light of s. 175 of the Code, what is the effect of the transfer of the said land to the 2nd defendant? Section 175 allows the registration of a dealing if it is expressed to be subject to the right of the caveator and to the registration of which the caveator has given his written consent. In this case there is no written consent given by the caveators. However, I am satisfied that consent of the caveators has in fact been given for the registration as no objection was ever raised by them at the time the order of the Court dated 20 August 1990 was made or subsequently. Thus, consent is implied. The only thing that they are not satisfied

is that the registration was not subject to their rights as caveators. Since I am of the view that their right as such has been wrongly determined by the Registrar, I order that the Registrar rectifies the situation by restoring in the Register, document of title and other instrument applicable the caveats of the plaintiffs to take effect retrospectively to the dates they were originally entered upon the Register. This will have the effect that the 2nd defendant takes the said land subject to the rights of the plaintiffs caveators.

As to damages claimed by the plaintiffs, I make no order as there is no evidence before me as to actual loss suffered by the plaintiffs. They suffered no actual prejudice apart from the deprivation of their rights of having their caveats remain in the Register. Any damage, if any, is nominal.

As to costs, I order the 1st and 3rd defendants to pay the costs of this proceedings to the plaintiffs which amount, unless agreed, is to be taxed. No order is made against the 2nd defendant as it is not instrumental to the determination of the plaintiffs' caveats by the Registrar.

Also found at [1992] 3 CLJ 1428